88-632

No. _____

Supreme Court, U.S.
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In The
# Supreme Court of the United States
October Term, 1988

—o—

CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, SKYWAY DEVELOPMENT CORPORATION, a Florida corporation, and MURRAY WEISS,

*Petitioners,*

v.

SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.; LELAND E. STANSELL, JR.; JOHN H. LEWIS; and MARK A. KAMILAR,

*Respondents.*

—o—

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

—o—

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## QUESTION PRESENTED

Whether the Florida Constitution's limitation on the Florida Supreme Court's jurisdiction, by excluding review of those decisions that the lower Florida appellate courts have arbitrarily chosen to announce without a written opinion, violates the equal protection and the due process clauses of the fourteenth amendment.

## RULE 28.1 LISTING

1. Saftron, Inc.
2. Rainbow Railing Corporation
3. Consolidated Pershing Ventures, Inc.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Consolidated Capital Corporation, Skyway Development Corporation and Murray Weiss respectfully petition for a writ of certiorari to review an order of the Supreme Court of Florida.

———o———

## OPINION BELOW

The opinion of the Supreme Court of Florida, attached as appendix A, p. 1a, has not been reported.

The opinion of the Second District Court of Appeal of Florida, attached as appendix B, p. 3a, has not been reported.

———o———

## JURISDICTION

A Florida circuit court entered a final judgment against petitioners after a summary, non-jury evidentiary proceeding, awarding attorneys' fees and costs and imposing charging liens. Appendix C, p. 5a. The Florida Second District Court of Appeal, without comment, explanation or opinion, entered a per curiam order affirming the circuit court's final judgment. Appendix B, p. 3a.

Petitioners were unable to invoke the jurisdiction of the Florida Supreme Court because article V, section 3 (b)(3) of the Florida Constitution permits review only where a "decision of a district court of appeal *expressly*

. . . construes a provision of the state . . . constitution." *Emphasis added.* In accordance with the Florida Supreme Court's internal operating procedure II.A.1.(a), the case was automatically dismissed because no written opinion was issued by the district court of appeal. Appendix A, p. 1a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (as amended Pub. L. 100-352, 53 June 27, 1988). As the judgment below was entered before the effective date of the recent amendment to § 1257, such amendment (substituting certiorari for the right to appeal) does not affect the right to or manner of review formerly provided by appeal in accordance with 28 U.S.C. § 1257(2). *See* 28 U.S.C. § 1254 editorial notes.

## CONSTITUTIONAL PROVISIONS INVOLVED

*U.S. Const. amend. XIV, § 1:*

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Fla. Const. art. V, § 3(b):*

> (b) Jurisdiction—The supreme court:
>
> (1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

. . . .

## RAISING THE FEDERAL QUESTION

The constitutional issue was raised at the earliest possible stage in the proceedings. Petitioners invoke the due process and equal protection clauses of the fourteenth amendment in order to challenge the validity of article V, section 3(b)(3) of the Florida Constitution, which limits the jurisdiction of the Florida Supreme Court and pursuant to which petitioners' case was dismissed by the Florida Supreme Court, appendix A, p. 1a. Thus, the earliest stage of the litigation at which the constitutional

issue could have been raised was at the time appellants petitioned to obtain review by the Florida Supreme Court.[1] In their petition for review, petitioners did indeed assert their constitutional claim. See appendix D, p. 19a. The Florida Supreme Court denied the petition for review, citing *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980), thereby indicating that the reason for denial was the limitation imposed by article V, section 3(b)(3) and the court's inability to review a per curiam affirmance, without written opinion. Appendix A, p. 1a. The Florida Supreme Court thus necessarily considered and rejected the fourteenth amendment claims of petitioners.

—o—

## STATEMENT OF THE CASE

Following a settlement of litigation in which they were involved, petitioners, Consolidated Capital Corporation, Skyway Development Corporation and Murray Weiss, became embroiled in an attorney's fee dispute with respondents, Shea & Gould; Conroy, Simberg & Wilensky; Carey, Dwyer, Cole, Eckhart, Mason & Spring, P.A.; Leland E. Stanswell, Jr.; John H. Lewis; and Mark A. Kamilar, all of whom had served as counsel for Consolidated Capital Corporation and Skyway Development Corporation in the course of prior litigation. Respondents moved

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[1] Petitioners also notified the Second District Court of Appeal of the constitutional challenge. See Petition for Rehearing and Stay of Mandate, appendix E, p. 31a. In addition, petitioners called the attention of both the Florida Supreme Court, see appendix D, p. 19a, and this Court, see appendix F, p. 42a, to the constitutional challenge as part of its motions for stay.

for imposition of charging liens in a Florida circuit court in which they had represented petitioners. That court granted the charging liens for all except Mark A. Kamilar, in the aggregate amount of $719,935.05. In the process of imposing the liens, the court rejected petitioners' demand for a jury trial, made pursuant to article I, section 22, of the Florida Constitution, on the question of the amount of the liens.

Petitioners appealed the court's order to the Florida Second District Court of Appeal, asserting, in part, that they were entitled to a trial by jury on the issue of the amount of attorneys' fees awarded. The Second District Court of Appeal affirmed the trial court's order by a per curiam affirmance without issuing an opinion. Appendix B, p. 3a. Following the denial of petitioners' timely filed motion for rehearing and rehearing en banc, appendix G, p. 63a, petitioners sought to stay the mandate. Petitioners filed a motion to stay the issuance of the mandate in the second district court, pending certiorari proceedings in the Florida Supreme Court, appendix E, p. 31a, and filed a notice to invoke the Florida Supreme Court's discretionary jurisdiction, appendix H, p. 65a. Following the second district court's denial of petitioners' motion to stay the mandate, appendix D, p. 19a, petitioners filed with the Florida Supreme Court a motion to review that denial and a motion to stay the mandate, appendix D, p. 19a. In that motion, petitioners again raised the jury trial claim, and asserted as well that article V, section 3(b)(3), of the Florida Constitution, insofar as it prohibits supreme court review of per curiam affirmances by district courts of appeal, is unconstitutional under the Fourteenth Amendment of the Constitution of the United States. The Florida

Supreme Court dismissed the petition for review, indicating by citation that its denial stemmed from the jurisdictional limitation of article V, section 3(b)(3). Appendix A, p. 1a. Petitioners then filed an Application to Recall and Stay Mandate with this Honorable Court, appendix F, p. 42a, which was denied, appendix J, p.71a.

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## REASONS FOR GRANTING THE WRIT

### POINT I

### THE QUESTION IS SUBSTANTIAL

The issue in this case is whether article V, section 3(b)(3) of the Florida Constitution conflicts with the due process and equal protection clauses of the fourteenth amendment. Article V, section 3(b)(3) dramatically limits the power of the Florida Supreme Court to review the decisions of intermediate appellate courts. This Court has never addressed the validity of those limitations. The peculiar terms used by the Florida Constitution to draw its limitations are manifestly inconsistent with the fourteenth amendment. As article V, section 3(b)(3) affects all Florida litigants, the question raised here is substantial.

### POINT II

### ARTICLE V, SECTION 3(b)(3) ENABLES FLORIDA INTERMEDIATE COURTS TO ARBITRARILY CREATE TWO UNEQUAL CLASSES OF LITIGANTS.

In *Jenkins v. State,* 385 So. 2d 1356, 1359 (Fla. 1980), the Florida Supreme Court held that inclusion of the word

"expressly" in article V, section 3(b)(3) of the Florida Constitution deprives that court of "jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion . . . when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court." The Manual of Internal Operating Procedures of the Supreme Court of Florida extends *Jenkins* to cover all cases (including those arising under § 3(b)(3)) in which a petitioner seeks to invoke the discretionary jurisdiction of the court: "When a notice of seeking discretionary review is filed, the clerk's office will determine whether a district court of appeal has written an opinion in the case. If there is no opinion, the case is automatically dismissed." *The Sup. Ct. of Fla. Manual of Internal Operating Procedures,* § 11.A.1(a) (1981).

The Florida Supreme Court is apparently the only state supreme court in the United States whose jurisdiction to decide whether to review a decision of the state's intermediate appellate courts depends upon whether the court whose decision is subject to review has chosen to write an opinion. Scheb & Scheb, "Making intermediate appellate courts final: assessing jurisdictional changes in Florida's appellate courts," 67 *Judicature* 474 (1984) ("Florida's intermediate appellate courts now exercise a finality of jurisdiction unique among state appellate structures."). It appears that almost one-half of all district court of appeal decisions are rendered in the form of a per curiam affirmance [PCA], and therefore auto-

matically fall outside the jurisdiction of the Florida Supreme Court.[2]

Article V, section 3(b)(3) of the Florida Constitution thus defines two classes of litigants. Litigants who obtain not only a decision but also an opinion from a district court of appeal, may seek Florida Supreme Court review of the district court of appeal's decision. Litigants who obtain a decision, but no opinion, from a district court of appeal, have no right to petition the Florida Supreme Court for review.

The distinction between the two groups of litigants is arbitrary. No guidelines exist for the district courts of appeal to follow to ensure consistent and proper use of the per curiam affirmance. "[T]he decision of whether to write an opinion" in the end "rests with the assigned panel of three judges." *Whipple v. State*, 431 So. 2d 1011, 1015 (Fla. 2d DCA 1983). Judges of the district courts of appeal, of course, do not explain their decisions to issue per curiam affirmances in place of written opinions. Inevitably, the standards for choosing whether to write an opinion will vary from panel to panel (or from judge to judge within a panel), and, indeed, from district to district. *Cf. Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816). "In fine, there is no limit to the grounds that

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[2] "The use of the PCA by the district courts of appeal has not only continued, its use has increased since the 1980 reforms. In 1979, (prior to reform) approximately 40 per cent of district court decisions were disposed of in this manner. The percentage increased to 47 per cent for 1981 and 1982." Scheb & Scheb, *supra*, p. 481 (footnote omitted).

may prompt a per curiam opinion." *Newmons v. Lake Worth Drainage Dist.*, 87 So. 2d 49, 51 (Fla. 1956), *quoted in Department of Legal Affairs v. District Court of Appeal*, 434 So. 2d 310, 312 (Fla. 1983).

Thus, the Florida Constitution deprives an entire class of litigants of even the opportunity to seek review by the Florida Supreme Court. That class is created by the unreviewable and arbitrary decision of a lower appellate court not to write an opinion, thereby penalizing litigants who have the misfortune of residing in a judicial district having a crowded docket or who randomly draw panels of judges that for whatever reason do not wish to write an opinion. In Florida, therefore, appellate review is dictated in large respect by chance, rather than logic.

## POINT III

## FLORIDA'S DUAL SYSTEM OF APPELLATE COURTS VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

"[I]f a State has created appellate courts . . . , the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). This Court has repeatedly judged state appellate procedures in light of due process and equal protection requirements. Constitutional limits are applicable in both criminal and civil cases, *see, e.g., Douglas v. California*, 372 U.S. 353 (1963) (right to counsel on

appeal from criminal conviction); *Bankers Life & Cas. Co. v. Crenshaw*, — U.S. —, 108 S. Ct. 1645, 1651-54 (1988) (propriety of bond requirement for civil appeals); *Lindsey v. Normet*, 405 U.S. 56 (1972) (same), and in cases in which state law defined appellate jurisdiction as discretionary rather than mandatory. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 609-16 (1974).

**1. Article V, section 3(b)(3) violates the equal protection clause.**

The two classes that article V, section 3(b)(3) establishes are arbitrarily defined, and therefore violate the equal protection clause of the fourteenth amendment. Cases have arisen, and will continue to arise, in which the Florida Supreme Court's jurisdiction would obviously have been proper but for the decision of a district court of appeal to announce its judgment in the form of a per curiam affirmance. For example, in *Palmore v. Sidote*, 426 So. 2d 34 (Fla. 2d DCA 1982), the Second District Court of Appeal affirmed per curiam a trial court's decision denying a woman custody of her child because the woman, who was white, was living with a black man. Denied the jurisdiction of the Florida Supreme Court by the Second District's decision not to write an opinion, the woman successfully sought review in the United States Supreme Court, and obtained a unanimous decision reversing the Second District Court of Appeal decision. *See* 466 U.S. 429 (1984).

*Palmore* involved an intermediate Florida appellate court's use of the per curiam affirmance where federal constitutional rights were at stake. The substantial question involved in *Palmore* was brought to light and addressed only because this Court, unlike the Florida Su-

preme Court, was not barred from taking jurisdiction. However, in cases in which state constitutional issues are at stake, such as in this case, district courts may also similarly err in construing state constitutional rights. In those cases, however, this Court lacks jurisdiction to review and remedy such misjudgments. Thus, there is no further review of decisions affecting state constitutional rights, and errors, therefore, remain uncorrected.

An appellate court's decision on whether to issue a written opinion converts similarly situated litigants into dissimilarly situated ones, and then uses this distinction as the basis for preventing further review to one class of litigants. It is, therefore, the very essence of arbitrary state action. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (opinion of Blackmun, J.) (dismissal of employment discrimination charge because of state commission's failure to timely schedule a fact finding hearing within state-imposed 120 day period violated the due process and equal protection clauses). Under article V, section 3(b)(3), litigants having identical claims, and whose state constitutional rights are identically affected, may not have identical appellate remedies for protection of those rights.

The remedies given by the Florida Constitution depend entirely upon whether a panel has chosen to write an opinion, and thereby potentially subject its decision to further appellate review. Litigants possess no power to require a district court of appeal to issue a written opinion, and thus it is unfair and irrational to punish them for a district court's failure to do so. *Cf. Logan*, 455 U.S. at 443, 444 (Powell, J., concurring in judgment). Article V, section 3(b)(3), therefore, constitutes an effective

foreclosure of a right to appeal as to some litigants only, *cf. Lindsey,* 405 U.S. at 77, 79 (state requirement of double bond for tenant eviction cases violated the equal protection clause because it burdened appeals of certain defendants in an arbitrary and capricious manner), and thus, as this Court has twice suggested in recent years, would "violate equal protection guarantees under even deferential scrutiny," *cf. Logan,* 455 U.S. at 442; *Lindsey,* 405 U.S. at 77, 79.

The reasons given to justify the arbitrary distinction among litigants created by article V, section 3(b)(3) are irrational. The Florida Supreme Court believes that its concerns are only to preserve and ensure "uniformity of principle and practice." *Jenkins,* 385 So. 2d at 1358 (quoting *Ansin v. Thurston,* 101 So. 2d 808, 810 (Fla. 1958)). Presumably, decisions without opinion pose no threat to uniformity and, therefore, are of no concern to the court. Article V, section 3(b), however, is not itself true to this purported justification. Subsections 1 & 2 of article V section 3(b) grant the Florida Supreme Court jurisdiction to review, without regard to the existence of a written opinion below, "decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution," as well as "final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and . . . action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service." Thus, the court is indeed concerned, in particular instances, with matters other than uniformity of practice and principle.

Putting aside the goal of uniformity, is not the Florida Supreme Court concerned also with justice in the indivi-

dual case? The court purports not to be so concerned. *Jollie v. State*, 405 So. 2d 418, 423 (Fla. 1981) (Boyd J. dissenting) (Article V, section 3 "represents an express negation of the idea of the Supreme Court, except in exercise of its appellate jurisdiction, as the court of last resort for the individual litigant in his quest for individual justice."). Not surprisingly and to its credit, however, the Florida Supreme Court in practice has proven unwilling to ignore entirely the question of justice in the individual case. *Compare Jollie*, 405 So. 2d at 423 *with Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980).

Another reason given to justify the classification is that, in the opinion of six of the seven members of the Florida Supreme Court when article V, section 3 was amended in 1980, a "structural change was essential to avoid a potential decline in the quality of [the court's] work and its increasing backlogs and delays." *Jenkins*, 385 So. 2d at 1361 (England, C.J., concurring specially). A crowded court docket, however, is an insufficient reason to arbitrarily distinguish between like litigants in determining whether they are entitled to seek further appellate review.

In sum, whether litigants are entitled to seek review by the Florida Supreme Court is dependent almost entirely upon chance. Without an opinion from the district court, a litigant is foreclosed from further review. That same litigant, however, may be entitled to seek further review due simply to the appellate court's inclusion of a case citation, signal or cryptic phrase. "[T]he randomness of the district court's processing" would appear to "con-

trol the party's right of review . . . ." *Jollie*, 405 So. 2d at 421. Article V, section 3(b)(3), arbitrarily and therefore unconstitutionally, blocks "substantial appeals along with insubstantial ones." *Crenshaw*, 108 S. Ct. at 1653. *See also, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985).[3]

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[3] Appellants do not ask this Court to adjudicate the merits of their claim of a right to a jury trial under the Florida Constitution. Nor do they ask this Court to order the Florida Supreme Court to adjudicate the merits of the jury trial issue. Appellants seek only a ruling by this Court that article V, section 3(b)(3), of the Florida Constitution is unconstitutional insofar as it bars the Florida Supreme Court from deciding whether, on its merits, appellants' jury trial claim falls within that court's jurisdiction. In this respect, it is important for this Court to recognize that appellants can in fact plausibly argue that the trial court erred in refusing to recognize a jury trial right. The Florida Supreme Court has twice considered the question of charging liens in recent years. In both cases, however, the issue before the court was the threshold question of whether the charging lien should be imposed. *See Daniel Mones, P.A. v. Smith*, 486 So. 2d 559, 561 (Fla. 1986) (insufficient notice precludes imposition of charging lien); *Sinclair, Louis et al., P.A. v. Baucom*, 428 So. 2d 1383 (Fla. 1983) (charging lien properly imposed). In neither case, therefore, did the Florida Supreme Court have any occasion to rule on the procedures through which the amount of money secured by the lien might be ascertained. The court, thus, did not rule on the question at issue in this case—given that a charging lien is imposed, may petitioners claim the right to trial by jury on the question of the amount of the monies to which the lien attaches. Recent district court opinions, for the most part, also address only the preliminary question of the availability of a charging lien. *See, e.g., Dowda and Fields, P.A. v. Cobb*, 452 So. 2d 1140, 1143 (Fla. 5th DCA 1984); *Brake v. Sanchez-Lopez*, 452 So. 2d 1071, 1073 (Fla. 3d DCA 1984); *Urbieta v. Urbieta*, 446 So. 2d 230, 231 (Fla. 3d DCA 1984). Earlier district court decisions held, or plainly assumed, that if the amount

(Continued on following page)

### 2. Article V, section 3(b)(3) violates the due process clause.

Whether the Florida Supreme Court has jurisdiction to consider a litigant's petition for discretionary review depends upon whether the lower Court has chosen to announce its decision with or without an opinion. Whether the district court chooses to render an opinion is not within a litigant's control. A litigant's property rights are thereby taken: either the right represented by the underlying cause of action, *see Logan*, 455 U.S. at 429-33, or the entitlement created by article V, section 3(b)(3) itself—the right to seek to invoke the Florida Supreme Court's discretionary review of a district court's decision that "construes a provision of the state of federal constitution" or "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court

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(Continued from previous page)

at issue were in dispute, or if a charging lien had not been obtained, attorneys would have to proceed by independent action at law, with jury trial rights applicable in the independent proceeding. *See, e.g., Weksler v. Stamatinos*, 314 So. 2d 616, 618 (Fla. 3d DCA 1975), *cert. denied*, 336 So. 2d 108 (Fla. 1976); *Worley v. Phillips*, 264 So. 2d 42, 43 (Fla. 2d DCA 1972) (jury trial in independent action to recover fees); *Kurzweil v. Simon*, 204 So. 2d 254, 256 (Fla. 3d DCA 1967); *Riddle Airlines, Inc. v. McGahey*, 144 So. 2d 92, 93-94 (Fla. 3d DCA 1962) (enforcing jury trial right in independent action); *Chaachou v. Chaachou*, 122 So. 2d 24, 27 (Fla. 3d DCA 1960); *see also City of Niceville v. State*, 216 So. 2d 763, 765 (Fla. 1st DCA 1968) (if amount not in dispute, no jury trial right on fee question), *cert. denied*, 225 So. 2d 532 (Fla. 1969). It is clear, at least, that "first party disputes between attorney and client . . . are ordinary damage actions at law which are subject to trial by jury." *Stabinski, Funt & De Oliveira, P.A. v. Alvarez*, 490 So. 2d 159, 161 (Fla. 3d DCA), *review denied* 500 So. 2d 545 (Fla. 1986).

on the same question of law." Article V, section 3(b)(3) —or rather, the "expressly" limitation included in that provision—deprives petitioners of the opportunity to present their case and have its merits fairly judged.

The property right is taken randomly, and, therefore, must be justified by a substantial state interest. As the Court stated in *Logan*, 455 U.S. at 435, "[a] system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." The substantial state interest given to support this high risk—to promote efficiency in disposing of claims—is insubstantial in relation to the rights being deprived.

Thus, the failure of the Florida Supreme Court, in cases like this, to allow petitioners to attempt to invoke the discretionary jurisdiction of the court deprives petitioners of a property right, without due process of law.

## CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

October 11, 1988

Respectfully submitted,

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## APPENDIX A

SUPREME COURT OF FLORIDA

WEDNESDAY, JULY 13, 1988

| | | |
|---|---|---|
| CONSOLIDATED CAPITAL CORPORATION, A FLORIDA CORPORATION, SKYWAY DEVELOPMENT CORPORATION, A FLORIDA CORPORATION AND MURRAY WEISS, | ) | CASE NO. 72,703 |
| PETITIONERS, | ) | DISTRICT OF APPEAL, |
| V. | ) | 2ND DISTRICT |
| SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.; LEDLAND (sic) STANSELL, JR.; JOHN H. LEWIS AND MARK A. KAMILAR, | ) | NOS: 86-2100 86-2259 |
| RESPONDENTS. | ) | |

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

(SEAL)

B

cc: Hon. William A. Haddad, Clerk
Hon. Richard L. Ake, Clerk
Hon. Vernon W. Evans, Jr., Judge
Lawrence A. Kellogg, Esquire
Bonnie L. Cooper, Esquire
Robin S. Trupp, Esquire

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John H. Lewis, Esquire
H. Jack Klingensmith, Esquire
Pamela Beckman, Esquire
Leland E. Stansell, Jr., Esquire
Evan J. Langbein, Esquire
Alberto A. Mecia, Esquire

## APPENDIX B

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

| | | |
|---|---|---|
| CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, SKYWAY DEVELOPMENT CORPORATION, a Florida corporation and MURRAY WEISS, | ) | |
| Appellants, | ) | Case Nos. 86-2100 86-2259 |
| v. | ) | |
| SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.,; LELAND E. STANSELL, JR.; JOHN H. LEWIS and MARK A. KAMILAR, | ) | CONSOLIDATED |
| Appellees. | ) | |

Opinion filed April 29, 1988

Appeals from the Circuit Court for Hillsborough County; Vernon W. Evans, Jr., Judge.

Lawrence A. Kellogg of Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, Miami, for Appellants Consolidated Capital Corporation and Skyway Development Corporation.

Robin S. Trupp of Nixon and Nixon, Tampa, for Appellant Murray Weiss.

H. Jack Klingensmith and Alberto A. Macia of Shea & Gould, Miami, for Appellees Shea & Gould and Conroy, Simberg & Wilensky, P.A.

Pamela Beckham of Carey, Dwyer, Cole, Eckhart, Mason & Spring, P.A., Pro se.

Evan J. Langbein, Miami, for Appellee Leland E. Stansell, Jr.

John H. Lewis, Pro se.

Mark A. Kamilar, Pro se.

PER CURIAM.

Affirmed.

DANAHY, C.J., RYDER and PARKER, JJ., Concur.

## APPENDIX C

IN THE CIRCUIT COURT OF THE 13TH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, and SKYWAY DEVELOPMENT CORPORATION, a Florida corporation,

Plaintiffs/
Counter-Defendants,

vs.

FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A., et. al.,

Defendants/Counter
Plaintiffs//Third
Party Plaintiffs,

vs.

MURRAY WEISS, et al.,

Third Party
Defendants.

CASE NO. 82-12358
Division "P"

FINAL JUDGMENT

FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A.,

Plaintiff,

vs.

SKYWAY DEVELOPMENT CORPORATION, et. al.,

Defendants.

CASE NO. 85-12559

Division "J"

This action for enforcement of attorneys' charging liens filed by SHEA & GOULD, CONROY, SIMBERG & WILENSKY, P.A., MARK A. KAMILAR, JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. was tried before the Court. On the evidence presented

IT IS ADJUDGED

1. That the Court finds as follows:

(a) SHEA & GOULD, as successor in interest to COHEN, BROWN, REED, IVANS & SCHWARTZ, has a perfected, charging lien against CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION for attorneys fees and costs rendered to and incurred on behalf of CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION.

The charging lien of SHEA & GOULD is founded on a written contingency agreement which expressly provides that the law firm is to be paid an attorneys fees of one-

sixth (1/6) of all sums recovered by verdict, judgment, settlement or otherwise, and all costs and expenses incurred.

Although SHEA & GOULD agreed to a fee limitation on funds on deposit in Federal Bankruptcy Court, that limitation is void and of no force and effect because:

(i) There is no consideration for the limitation. The fee limitation was contingent or conditioned on CONROY, SIMBERG & WILENSKY, P.A. agreeing to it. However, CONROY, SIMBERG never consented to the limitation. Furthermore, when SHEA & GOULD agreed to the limitation it had a reasonable expectation that it would be involved and have a voice in any settlement negotiations. Notwithstanding this expectation, SHEA & GOULD was completely excluded by CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION from any involvement or participation in the negotiations which resulted in the settlement announced in open court on January 22, 1986; and

(ii) The limitation applies only to those funds on deposit in Federal Bankruptcy Court recovered by CONSOLIDATED CAPITAL CORPORATION and/or SKYWAY DEVELOPMENT CORPORATION. However, all monies on deposit in Federal Bankruptcy Court were paid to FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A. in satisfaction of their claim for attorneys fees. Accordingly, those funds were not recovered by CONSOLIDATED CAPITAL CORPORATION and/or SKYWAY DEVELOPMENT CORPORATION, but by the FOWLER, WHITE law firm.

(b) CONROY, SIMBERG & WILENSKY, P.A. has a perfected, charging lien against CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION for attorneys fees and costs

rendered to and incurred on behalf of CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION.

The charging lien of CONROY, SIMBERG is based on a written contingency agreement which expressly provides that the law firm is to be paid an attorneys fee of two-sixths (2/6) of all sums recovered by verdict, judgment, settlement or otherwise and all costs and expenses incurred. In consideration thereof, CONROY, SIMBERG agreed to pay and satisfy any valid liens of MARK A. KAMILAR, JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY DWYER, COLE, ECKHART, MASON & SPRING, P.A. for representing CONSOLIDATED CAPITAL CORPORATION and/or SKYWAY DEVELOPMENT CORPORATION in the action against the FOWLER, WHITE law firm. The validity and/or amount of any such liens is to be determined by mutual agreement between CONROY, SIMBERG and the particular attorney or law firm involved or if no agreement can be reached then by court order.

(c) CONROY, SIMBERG & WILENSKY, P.A. was unable to agree with MARK A. KAMILAR, JOHN H. LEWIS, LELAND E. STANSELL, JR. or CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. on the validity and/or amount of their liens.

(d) CONROY, SIMBERG & WILENSKY, P.A. did not consent or agree to any limitation on their attorneys fees based on the funds held on deposit in Federal Bankruptcy Court.

(e) The contingency contemplated by and referred to in the written representation agreements between

SHEA & GOULD and CONROY, SIMBERG & WILENSKY, P.A. and CONSOLDIATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION occurred, became due and payable and was a liquidated claim on February 22, 1986, when the settlement between CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION and the FOWLER, WHITE law firm was announced in open court.

(f) SHEA & GOULD and CONROY, SIMBERG & WILENSKY, P.A. were still retained, employed by and representing CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION when the settlement was reached on January 22, 1986. CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION did not terminate or sever their attorney-client relationship with SHEA & GOULD and CONROY, SIMBERG & WILENSKY, P.A. until February 11, 1986.

(g) The funds recovered as a result of the settlement concluded on January 22, 1986 total $1,365,536.41.

(h) The total settlement amount of $1,365,536.41 was produced solely by and as a result of the legal services performed by SHEA & GOULD, CONROY, SIMBERG & WILENSKY, P.A., MARK A. KAMILAR, JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A., for and on behalf of CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the litigation before this Court against the FOWLER, WHITE law firm and various individual members of that firm. No part or portion of the settlement

funds was the result of or attributable to, either directly or indirectly, the lawsuit filed in Dade County, Florida, Case No. 82-20822 CA (29) or the Federal Bankruptcy proceedings filed in the Middle District of Florida, Case No. 82-2274 BK-T.

(i) SHEA & GOULD incurred costs and expenses of $1,208.36 as a result of representing CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the action before this Court against the FOWLER, WHITE law firm. Neither CONSOLIDATED CAPITAL CORPORATION or SKYWAY DEVELOPMENT CORPORATION have paid any portion of these costs and expenses.

(j) CONROY, SIMBERG & WILENSKY, P.A. incurred costs and expenses of $35,958.28 as a result of representing CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the action before this Court against the FOWLER, WHITE law firm. Neither CONSOLIDATED CAPITAL CORPORATION or SKYWAY DEVELOPMENT CORPORATION have paid any part of these costs and expenses.

(k) SHEA & GOULD is entitled to recover its contingency fee on the full amount of the $1,365,536.41 settlement between CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION and the FOWLER, WHITE law firm. Accordingly, SHEA & GOULD shall recover one-sixth (1/6) of $1,365,536.41 or $227,589.41 as its attorneys fee for representing CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the action

before this Court against the FOWLER, WHITE law firm.

(l) CONROY, SIMBERG & WILENSKY, P.A. is entitled to recover its contingency fee on the full amount of the $1,365,536.41 settlement between CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION and the FOWLER, WHITE law firm. Accordingly, CONROY, SIMBERG & WILENSKY, P.A. shall recover two-sixths (2/6) of $1,365,536.41 or $455,178.80 as its attorneys fee for representing CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the action before this Court against the FOWLER, WHITE law firm. The amount determined by this Court for the charging liens filed by MARK A. KIMILAR, JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. will be deducted and paid from the fee of $455,178.80 due CONROY SIMBERG & WILENSKY, P.A.

(m) SHEA & GOULD is entitled to and shall recover the sum of $1,208.56 as costs and expenses incurred as a result of its representation of CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the action before this Court against the FOWLER, WHITE law firm.

(n) CONROY, SIMBERG & WILENSKY, P.A. is entitled to and shall recover the sum of $35,958.28 as costs and expenses incurred as a result of its representation of CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the action before this Court against the FOWLER, WHITE law firm.

(o) The charging lien of MARK A. KAMILAR is based exclusively on a written contingency agreement and not quantum meruit. Mr. Kamilar was discharged and replaced as counsel for CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION on November 8, 1983 and was never counsel of record for those corporations after that date. The contingency contemplated by the agreement relied on by MR. KAMILAR did not occur until January 22, 1986, when the settlement between CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION and the FOWLER, WHITE law firm was concluded and announced in open court. Accordingly, MR. KAMILAR is precluded from any recovery based on his contingency agreement. And, since he offered no evidence on a quantum meruit theory his charging lien is denied and he shall not recover any portion of the attorneys fees awarded to CONROY, SIMBERG & WILENSKY, P.A. by this Court.

(p) The charging lien of JOHN H. LEWIS is based on quantum meruit and the reasonable value of his services rendered to CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION is $10,000. Accordingly, this sum will be deducted and paid to MR. LEWIS from the attorneys fees awarded to CONROY, SIMBERG & WILENSKY, P.A. by this Court.

(q) The charging lien of LELAND E. STANSELL, JR. is based on quantum meruit and the reasonable value of his services rendered to CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION is $40,000. Accordingly, this sum will be deducted and paid to MR. STANSELL from

the attorneys fees awarded to CONROY, SIMBERG & WILENSKY, P.A. by this Court.

(r) The charging lien of CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. is based on quantum meruit and the reasonable value of its services rendered to CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION is $70,000. Accordingly, this sum will be deducted and paid to the CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. firm from the attorneys fees awarded to CONROY, SIMBERG & WILENSKY, P.A. by this Court.

(s) SHEA & GOULD, CONROY, SIMBERG & WILENSKY, P.A., JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. shall be entitled to prejudgment interest of twelve percent (12%) a year on the attorneys fees and costs awarded to them by this Court from January 22, 1986, until the date this judgment is entered. Thereafter, they shall receive interest of twelve percent (12%) on the awarded attorneys fees and costs until those sums are paid in full.

(t) CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION have refused to pay any attorneys fees to SHEA & GOULD, CONROY, SIMBERG & WILENSKY, P.A., JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. for legal services and representation provided in the action before this Court against the FOWLER, WHITE law firm.

(u) All amounts awarded by this Court to SHEA & GOULD, CONROY, SIMBERG & WILENSKY, P.A., JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. shall be paid to them immediately from the funds deposited into the registry of the Court pursuant to the Order of this Court dated February 26, 1986.

(v) ALLEN P. REED, BRUCE F. SIMBERG, HARRIET LEWIS, CONROY, SIMBERG & WILENSKY, P.A., COHEN, BROWN, REED, IVANS & SCHWARTZ and SHEA & GOULD were at all times thoroughly and completely prepared in their representation of CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the action before the Court aganist the FOWLER, WHITE law firm and certain individual members of that firm.

ALLEN P. REED did not withdraw as counsel for CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION in the action before this Court against the FOWLER, WHITE law firm, did not request this Court for leave to withdraw as counsel, did not represent to anyone that he in fact would withdraw as counsel, and did not abandon the interests of CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION. Furthermore, CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION and their agents, representatives and employees knew or should have known that Mr. Reed had no intention of withdrawing as their counsel or abandoning their case.

ALLEN P. REED, BRUCE F. SIMBERG, HARRIET LEWIS, CONROY, SIMBERG & WILENSKY, P.A., COHEN, BROWN, REED, IVANS & SCHWARTZ and SHEA & GOULD represented CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION at all times with that degree of care, skill, knowledge, diligence and expertise commonly possessed and exercised under similar circumstances by a reasonable, careful and prudent trial attorney practicing in the community.

2. That SHEA & GOULD recover from CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION the sum of $227,589.41 as attorneys fees and $1,208.56 as costs, making a total of $228,797.97, that shall bear interest at the rate of 12% a year from January 22, 1986, for which let execution issue.

3. That CONROY, SIMBERG & WILENSKY, P.A. recover from CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION the sum of $335,178.80 as attorneys fees and $35,958.28 as costs, making a total of $371,137.08, that shall bear interest at the rate of 12% a year from January 22, 1986, for which let execution issue.

4. That JOHN H. LEWIS recover from CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION the sum of $10,000, that shall bear interest at the rate of 12% a year from January 22, 1986, for which let execution issue.

5. That LELAND E. STANSELL, JR. recover from CONSOLIDATED CAPITAL CORPORATION and

SKYWAY DEVELOPMENT CORPORATION the sum of $40,000, that shall bear interest at the rate of 12% a year from January 22, 1986, for which let execution issue.

6. That CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. recover from CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION the sum of $70,000, that shall bear interest at the rate of 12% a year from January 22, 1986, for which let execution issue.

7. That the charging lien of MARK A. KAMILAR is denied in its entirety, MARK A. KAMILAR takes nothing by this action for a charging lien against the fees awarded to CONROY, SIMBERG & WILENSKY, P.A. and CONROY, SIMBERG & WILENSKY, P.A. go hence without day.

8. That SHEA & GOULD, CONROY, SIMBERG & WILENSKY, P.A., JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A. shall recover from CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION costs incurred by them in prosecuting and enforcing their charging liens. This Court retains and reserves jurisdiction to award these costs at a later date upon the filing of motions.

9. That all sums awarded to SHEA & GOULD, CONROY, SIMBERG & WILENSKY, P.A., JOHN H. LEWIS, LELAND E. STANSELL, JR. and CAREY, DWYER, COLE ECKHART, MASON & SPRING, P.A.

pursuant to this Final Judgment, including all costs to be assessed at a later date, shall be paid immediately to those respective law firms and attorneys by the Clerk of this Court without further Order. Payment shall be made by the Clerk from the funds on deposit in the registry of the Court pursuant to the Court's Order dated February 26, 1986. The Clerk of this Court is therefore ordered and directed to immediately disburse and pay all sums awarded pursuant to this Final Judgment.

Payment by the Clerk to SHEA & GOULD and CONROY, SIMBERG & WILENSKY, P.A. shall be made to the trust account of their counsel of record, H. JACK KLINGENSMITH.

10. That all funds deposited in the registry of this Court pursuant to the Court's Order dated February 26, 1986, shall remain on deposit until all sums awarded pursuant to this Final Judgment, including costs to be assessed at a later date, have been paid in full. Thereafter, CONSOLIDATED CAPITAL CORPORATION and SKYWAY DEVELOPMENT CORPORATION say apply for release of the remaining balance of the funds on deposit by filing an appropriate motion with this Court. A copy of any such motion and notice of hearing thereon shall be served on all parties to these proceedings.

11. That this Court retains and reserves jurisdiction over the subject matter of these proceedings, the parties thereto and the funds on deposit in the registry of the Court for the purpose of enforcing the provisions of this Final Judgment and orders previously entered by the

Court and to grant such other relief as the Court deems necessary and equitable.

ORDERED at Tampa, Florida, on July 1, 1986.

/s/ VERNON W. EVANS, JR.,
Judge

Copies furnished to:

H. Jack Klingensmith, Esq.
Harriet Lewis, Esq.
Bruce Simberg, Esq.
Allen P. Reed, Esq.
Thomas Tew, Jr., Esq.
Mark A. Kamilar, Esq.
James M. Eckhart, Esq.
Leland E. Stansell, Jr., Esq.
John H. Lewis, Esq.

**APPENDIX D**

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

SECOND DISTRICT COURT OF APPEAL

CASE NOS: 86-2100
86-2259
CONSOLIDATED

FLORIDA BAR NO: 328601

| | |
|---|---|
| CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, SKYWAY DEVELOPMENT CORPORATION, a Florida corporation, and MURRAY WEISS, | ) |
| Petitioners, | ) |
| v. | ) |
| SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.; LELAND E. STANSELL, JR.; JOHN H. LEWIS; and MARK A. KAMILAR, | ) |
| Respondents. | ) |

MOTION TO REVIEW DENIAL OF MOTION TO
STAY ISSUANCE OF MANDATE AND
MOTION TO STAY ISSUANCE OF MANDATE

Petitioners, CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION, and MURRAY WEISS, by and through their un-

dersigned attorneys and pursuant to Florida Rules of Appellate Procedure 9.310, and 9.340 and Internal Operating Procedure Section 3V, file this motion to review the Second District Court's denial of stay of the issuance of the mandate and to stay the issuance of the mandate, and state:

1. On June 17, 1988, the Second District Court of Appeal entered an order denying the motions for rehearing and for rehearing *en banc* filed by Petitioners and directed to the opinion filed by the appellate court on April 29, 1988. Pursuant to Florida Rule of Appellate Procedure 9.340(b), the mandate will issue after July 5, 1988.

2. Petitioners filed a motion to stay the issuance of the mandate on July 1, 1988, in the Second District Court of Appeal.

3. The motion to stay the mandate was denied on July 8, 1988.

4. On July 5, 1988, Petitioners filed their notice to invoke discretionary jurisdiction of the Florida Supreme Court to review the Second District Court's opinion.

5. Although the opinion filed by the Second District Court consisted of a mere per curiam affirmance, without a written opinion, Petitioners seek to challenge, on constitutional bases, the limitation placed on the discretionary jurisdiction of this Court to review district court opinions on the basis of conflict or construction of the state or federal constitution only where a written opinion is issued. *See* art. V, § 3(b)(3), Fla. Const.; *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980).

6. Article V, section 3(a)(3) states, in pertinent part, that the Florida Supreme Court "[m]ay review any decision of a district court of appeal that expressly . . . construes a provision of the state or federal constitution, . . . or that expressly conflicts with a decision of another district court of appeal or of the Supreme Court on the same questions of law." In *Jenkins*, this Court held that inclusion of the word "expressly" in article V, section 3(b)(3) deprives this Court of "jurisdiction to review *per curiam* decisions of the several district courts of appeal of this state rendered without opinion . . . when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or the Supreme Court." 385 So.2d at 1359. Petitioners maintain, however, that article V, section 3(b)(3), as interpreted by *Jenkins*, constitutes a violation of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution.

7. Petitioners are aware of this Court's internal operating procedure II.A.1.(a), which provides that a case will automatically be dismissed if no written opinion has been issued by the District Court of Appeal; in fact, Petitioners anticipate that the case may well be dismissed by the Clerk of this Court. In that event, Petitioners intend to pursue to the United States Supreme Court their challenge of the limitation on the Florida Supreme Court's powers of discretionary review. If this Court allows them the opportunity by accepting jurisdiction, Petitioners shall present a good faith argument in this Court for the modification of the existing law regarding discretionary review. If this Court dismisses the case, Petitioner will then seek

review by the United States Supreme Court of article V, section 3(b)(3).

8. The Florida Supreme Court is the only state supreme court in the United States in possession of discretionary jurisdiction only in cases in which the court whose decision is subject to review has chosen to write an opinion. Scheb & Scheb, "Making intermediate appellate court final: assessing jurisdictional changes in Florida's appellate courts," 67 *Judicature* 474 (1984) ("Florida's intermediate appellate courts now exercise a finality of jurisdiction unique among state appellate structures"). It appears that almost one-half of all district court of appeal decisions are rendered in the form of a per curiam affirmance, and thus fall outside the jurisdiction of the Florida Supreme Court. *Scheb & Scheb, supra,* p. 481 (footnote omitted).

Article V, section 3(b)(3) of the Florida Constitution thus defines two classes of litigants: Litigants who obtain not only a decision, but an opinion, from a district court of appeal may seek review of the district court of appeal decision by the Florida Supreme Court; litigants who obtain a decision, but no opinion, from a district court of appeal have no right to petition the Florida Supreme Court for review. This dual system violates the equal protection and due process clauses of the fourteenth amendment of the United States Constitution.

The United States Supreme Court has repeatedly held that, "if a State has created appellate courts . . . , the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey,* 469 U.S.

387, 393 (1985). The United States Supreme Court has assessed state appellate procedures in light of due process and equal protection requirements in both criminal and civil cases, *see, e.g., Douglas v. California,* 372 U.S. 353 (1963) (right to counsel on appeal from criminal conviction); *Bankers Life & Cas. Co. v. Crenshaw,* 108 S.Ct. 1645, 1651-54 (1988) (property of bond requirement for civil appeals); *Lindsley v. Normet,* 405 U.S. 56 (1972) (same), and in cases in which state law defined appellate jurisdiction as discretionary rather than mandatory, *see, e.g., Ross v. Moffitt,* 417 U.S. 600, 609-16 (1974).

Article V, section 3(b)(3) of the Florida Constitution denies the Florida Supreme Court jurisdiction to consider a litigant's petition for discretionary review if a district court of appeal has chosen to announce its decision through the vehicle of a per curiam affirmance rather than issue an opinion explaining its conclusion. Which option the district court chooses is not within a litigant's control; however, which option the district court chooses determines whether a litigant will obtain a hearing in the Florida Supreme Court and the opportunity to argue that the district court decision requires review. A litigant's property rights are implicated: either the right represented by the underlying cause of action, *see Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-33 (1982), or the entitlement created by article V, section 3 itself—the right to seek to invoke the Supreme Court's discretionary review of a district court's decision that "construes a provision of the state or federal constitution" or "directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The failure of the Florida Supreme Court, in a case like this, to hear petitioners' claim to invoke the discretionary jurisdiction of the court violates due process. Article V, section 3—or rather, the "expressly" limitation included in that provision—deprives petitioners of "the opportunity to present [their] case and have its merits fairly judged" with respect to the question of the propriety of Florida Supreme Court review. *Logan, supra,* 455 U.S. at 433.

Even more clearly, the two classes that article V, section 3(b)(3) establish are arbitrarily defined, and, therefore, in violation of the Equal Protection Clause of the fourteenth amendment. Cases have arisen, and will continue to arise, in which the Florida Supreme Court's jurisdiction would have been obviouesly proper but for the decision of a district court of appeal to announce its judgment in the form of a per curiam affirmance. For example, in *Palmore v. Sidoti,* 426 So.2d 34 (Fla. 2d DCA 1982), the Second District Court of Appeal affirmed per curiam a trial court decision denying a woman custody of her child because the woman, who was white, was living with a black man. Denied the jurisdiction of the Florida Supreme Court, the woman successfully sought review in the United States Supreme Court, obtaining a unanimous decision reversing the Second District Court of Appeal decision. *See* 466 U.S. 429 (1984). Article V, section 3, "converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification." It is, therefore, "the very essence of arbitrary state action." *Logan, supra,* 455 U.S. at 442 (opinion of Blackmun, J.). Under article V,

section 3, litigants "with identical claims, despite equal diligence in presenting them," may "be treated differently, depending on whether" a district court of appeal chooses to write an opinion. Litigants possess no power to require a district court of appeal to issue an opinion, and thus "it is unfair and irrational to punish them" for a district court's "failure to do so." *Logan, supra,* 455 U.S. at 443, 444 (Powell, J., concurring in judgment). Article V, section 3, therefore, constitutes an "effective foreclosure of a state right to appeal as to some litigants only," *Crenshaw, supra,* 108 S.Ct. at 1654 n.6, and, thus, as the United States Supreme Court has twice suggested in recent years, would "violate equal protection guarantees under even deferential scrutiny," *id., Lindsley v. Normet, supra,* 405 U.S. at 77, 79. On these bases, Petitioners seek to invoke this Court's jurisdiction and, if necessary, intend to challenge in the United States Supreme Court, their inability to obtain Florida Supreme Court review of this action.

9. The foremost issue before the court on appeal was appellant's right to a jury trial to determine the proper amount of the charging lien to be imposed. In deciding the appeal, the Second District Court necessarily construed article I, section 22 of the Florida Constitution, which provides that: "[t]he right of trial by jury shall be secure to all and remain inviolate." Thus, had the district court issued a written opinion, rather than affirming the judgment below without opinion, petitioners would have had the opportunity to seek review of the opinion by this Court, pursuant to article V, section 3(b)(3).

The construction implicitly placed on article I, section 22 by the Second District Court and explicitly placed

by the Third District Court in *de la Cruz v. Brown*, 338 So.2d 245 (Fla. 3d DCA 1976), (charging lien is equitable in nature and court can determine amount of fee), conflicts with a long line of cases assessing the right to a jury trial (*see, e.g., Cerrito v. Kovitch*, 457 So.2d 1021 (Fla. 1984); *Hobbs v. Florida National Bank*, 480 So.2d 153 (Fla. 1st DCA 1985)). It is not the nature of the cause that determines ones right to a jury trial; rather it is the issue to be addressed that must be considered in determining whether a jury trial should be granted.

Although the right to and enforcement of a charging lien are issues to be determined on an equitable basis, the amount of the fees to be assessed is a legal issue to which the right to trial by jury is inviolate. *See Stabinski Funt & De Oliveira, P.A. v. Alvarez*, 490 So.2d 159, 161 (Fla. 3d DCA 1986), *review denied*, 500 So.2d 545 (Fla. 1986) ("first party disputes between attorney and client . . . are ordinary damage actions at law which are subject to trial by jury."). Courts have repeatedly held that "[W]here both legal and equitable issues are presented in a single case 'only under the most imperative circumstances . . . can the right to jury trial of legal issues be lost . . .'" *Cerrito*, 457 So.2d at 1022, (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959)). "[E]ven though some of the issues" to be adjudicated are equitable, if other issues "are legal ones," the parties "are entitled to a jury trial on these." *Hobbs*, 480 So.2d at 156. Thus, the opinion of the Second District Court in this case and the opinion in *de la Cruz* are plainly in conflict in their construction of article I, section 22, with

*Cerrito, Hobbs* and the cases they cite.[1] Therefore, had a written opinion been issued, the discretionary jurisdiction of this Court could have beeen sought on the basis of both constitutional construction and conflict.

10. Additionally, the final judgment by the trial court ruled on issues never raised before the summary charging lien proceedings and to which point evidence was precluded. The final judgment contains gratuitous language referring to the preparedness of counsel Shea & Gould and Conroy, Simberg & Wilensky and the caliber of representation received by Petitioner, even though the trial judge sustained objections to the introduction of evidence relating to counsel's preparedness and noted that the issued was not being tried. In ruling on the issue of whether the trial court erred in making these findings, the Second District Court necessarily construed the 5th and 14th amendments to the United States Constitution and concluded that the judge's ruling on an issue not raised and on which the parties had not been given notice or an opportunity to be heard did not violate due process. This conclusion is not only erroneous, but is a clear departure from the essential requirements of law. *Department of Environmental Regulation v. Montco Research Products Inc.*, 489 So.2d 771, 773 (Fla. 5th DCA) *review denied*, 494 So.2d 1152 (1986). Thus, had the district court issued a written opinion addressing this point,

---

[1] Petitioners' initial demand for a jury trial on all legal issues was sufficient to preserve that right notwithstanding their apparent acquiescence to non-jury proceedings. *See Chenery v. Crans*, 497 So.2d 267, 269 (Fla. 2d DCA 1986). Further, petitioners timely objected to the matter being heard without a jury.

review could have been sought in this Court on the basis of construction of a provision of the federal constitution.

11. Petitioners seek a stay of the mandate to prevent execution by Respondents, pending review, on the funds currently held as a supersedeas of the final judgment in the registry of the circuit court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. Sufficient funds are being held by the circuit court to secure the judgment and any additional interest that may have accrued. A stay of the mandate would effectively extend the stay of proceedings issued by the Circuit Court on July 3, 1986, pending the appeal to the Second District Court of Appeal.

12. Petitioners propose to leave those funds with the registry of the court pending all subsequent review.

13. For these reasons, Petitioners request that this Court review the Second District's denial of the motion to stay the issuance of the mandate and enter an order staying the mandate. Petitioners request that the mandate be stayed until either the cause has been fully determined, or counsel has had the opportunity to obtain a stay from the United States Supreme Court.

WHEREFORE, Petitioners seek the entry of an order staying the issuance of the mandate in this matter.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of July, 1988 to each party on the attached service list.

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**APPENDIX E**

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NOS: 86-2100
86-2259
CONSOLIDATED

FLORIDA BAR NO: 328601

CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, SKYWAY DEVELOPMENT CORPORATION, a Florida corporation, and MURRAY WEISS,

Appellants,

v.

SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.; LELAND E. STANSELL, JR.; JOHN H. LEWIS; and MARK A. KAMILAR,

Appellees.

MOTION TO STAY ISSUANCE OF MANDATE

Appellants, CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION, and MURRAY WEISS, by and through their undersigned attorneys and pursuant to Florida Rules of Appellate Procedure 9.310(e) and 9.340(a), file this motion to stay the issuance of the mandate, and state:

1. On June 17, 1988, this Court entered an order denying the motions for rehearing and for rehearing *en banc* filed by Appellants and directed to the opinion filed by this Court on April 29, 1988. Pursuant to Florida

Rule of Appellate Procedure 9.340(b), the mandate will issue after July 5, 1988.

2. Appellants intend to seek certiorari review by the Florida Supreme Court of this Court's opinion, and request a stay of the mandate pending such review.

3. The committee notes to Rules 9.310(e) and 9.340 expressly contemplate that a party may file a motion to stay the issuance of the mandate pending review and recognize the power of the court to delay the issuance of the mandate.

4. Although the opinion filed by this Court consisted of a mere per curiam affirmance, without a written opinion, Appellants seek to challenge, on constitutional bases, the limitation placed on the discretionary jurisdiction of the Florida Supreme Court to review district court opinions on the basis of conflict or construction of the state constitution only where a written opinion is issued. *See* art. V, § 3(b)(3), Fla. Const.; *Jenkins v. State,* 385 So.2d 1356, 1359 (Fla. 1980).

5. Article 5, section 3(a)(3) states, in pertinent part, that the Florida Supreme Court "[m]ay review any decision of a district court of appeal that expressly . . . construes a provision of the state . . . constitution, . . . or that expressly conflicts with a decision of another district court of appeal or of the Supreme Court on the same questions of law." In *Jenkins,* the Florida Supreme Court held that inclusion of the word "expressly" in article 5, section 3(b)(3) deprives that court of "jurisdiction to review *per curiam* decisions of the several district courts of appeal of this state rendered without opinion . . . when the basis for

such review is an alleged conflict of that decision with a decision of another district court of appeal or the Supreme Court." 385 So.2d at 1359. Appellants maintain, however, that article 5, section 3(b)(3), as interpreted by *Jenkins,* constitutes a violation of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution.

6. Appellants are aware of the Supreme Court's internal operating procedure II.A.1.(a), which provides that a case will automatically be dismissed if no written opinion has been issued by the District Court of Appeal; in fact, Appellants anticipate that the case will be dismissed by the Florida Supreme Court. In that event, Appellants intend to pursue to the United States Supreme Court, its challenge of the limitation on the Florida Supreme Court's powers of discretionary review. Appellants shall present good faith arguments in both the Florida and United States Supreme Courts for the modification of the existing law regarding discretionary review. As a prerequisite to seeking review by the United States Supreme Court of article 5, section 3(b)(3), the issue must first be raised by the Florida Supreme Court acting in this cause.

7. The Florida Supreme Court is the only state supreme court in the United States in possession of discretionary jurisdiction only in cases in which the court whose decision is subject to review has chosen to write an opinion. Scheb & Scheb, "Making intermediate appellate court final: assessing jurisdictional changes in Florida's appellate courts," 67 *Judicature* 474 (1984) ("Florida's intermediate appellate courts now exercise a finality of jurisdiction unique among state appellate structures"). It appears that almost one-half of all district court of ap-

peal decisions are rendered in the form of a per curiam affirmance, and thus fall outside the jurisdiction of the Florida Supreme Court. *Scheb & Scheb, supra,* p. 481 (footnote omitted).

Article 5, section 3(b)(3) of the Florida Constitution thus defines two classes of litigants: Litigants who obtain not only a decision, but an opinion, from a district court of appeal may seek review of the district court of appeal decision by the Florida Supreme Court; litigants who obtain a decision, but no opinion, from a district court of appeal have no right to petition the Florida Supreme Court for review. This dual system violates the equal protection and due process clauses of the fourteenth amendment of the United States Constitution.

The U.S. Supreme Court has repeatedly held that, "if a State has created appellate courts . . ., the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey,* 469 U.S. 387, 393 (1985). The U.S. Supreme Court has assessed state appellate procedures in light of due process and equal protection requirements in both criminal and civil cases, *see, e.g., Douglas v. California,* 372 U.S. 353 (1963) (right to counsel on appeal from criminal conviction); *Bankers Life & Cas. Co. v. Crenshaw,* 108 S.Ct. 1645, 1651-54 (1988) (property of bond requirement for civil appeals); *Lindsley v. Normet,* 405 U.S. 56 (1972) (same), and in cases in which state law defined appellate jurisdiction as discretionary rather than mandatory, *see, e.g., Ross v. Moffitt,* 417 U.S. 600, 609-16 (1974).

Article 5, section 3 of the Florida Constitution denies the Florida Supreme Court jurisdiction to consider a litigant's petition for discretionary review if a district court of appeal has chosen to announce its decision through the vehicle of a per curiam affirmance rather than issue an opinion explaining its conclusion. Which option the district court chooses is not within a litigant's control; however, which option the district court chooses determines whether a litigant will obtain a hearing in the Florida Supreme Court and the opportunity to argue that the district court decision requires review. A litigant's property rights are implicated: either the right represented by the underlying cause of action, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-33 (1982), or the entitlement created by article 5, section 3 itself—the right to seek to invoke the Supreme Court's discretionary review of a district court's decision that "construes a provision of the state or federal constitution" or "directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." The failure of the Florida Supreme Court, in a case like this, to hear petitioners' claim to invoke the discretionary jurisdiction of the court violates due process. Article 5, section 3—or rather, the "expressly" limitation included in that provision—deprives petitioners of "the opportunity to present [their] case and have its merits fairly judged" with respect to the question of the propriety of Florida Supreme Court review. *Logan, supra,* 455 U.S. at 433.

Even more clearly, the two classes which article 5, section 3 established are arbitrarily defined, and, therefore, in violation of the Equal Protection Clause of the

fourteenth amendment. Cases have arisen, and will continue to arise, in which the Florida Supreme Court's jurisdiction would have been obviously proper but for the decision of a district court of appeal to announce its judgment in the form of a per curiam affirmance. For example, in *Palmore v. Sidoti,* 426 So.2d 34 (Fla. 2d DCA 1982), the Second District Court of Appeal affirmed per curiam a trial court decision denying a woman custody of her child because the woman, who was white, was living with a black man. Denied the jurisdiction of the Florida Supreme Court, the woman successfully sought review in the United States Supreme Court, obtaining a unanimous decision reversing the Second District Court of Appeal decision. *See* 466 U.S. 429 (1984). Article 5, section 3, "converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification." It is, therefore, "the very essence of arbitrary state action." *Logan, supra,* 455 U.S. at 442 (opinion of Blackmun, J.). Under article 5, section 3, litigants "with identical claims, despite equal diligence in presenting them," may "be treated differently, depending on whether" a district court of appeal chooses to write an opinion. Litigants possess "no power to require a district court of appeal to issue an opinion," and thus "it is unfair and irrational to punish them" for a district court's "failure to do so." *Logan, supra,* 455 U.S. at 443, 444 (Powell, J., concurring in judgment). Article 5, section 3, therefore, constitutes an "effective foreclosure of a state right to appeal as to some litigants only," *Crenshaw, supra,* 108 S.Ct. at 1654 n.6, and, thus, as the U.S. Supreme Court has twice suggested in recent years, would "violate equal protection guarantees under even differential scrutiny," *id.,*

*Lindsley v. Normet, supra,* 405 U.S. at 77, 79. On these bases, Appellants intend to challenge their anticipated inability to obtain Florida Supreme Court review of this action.

8. The foremost issue before this court on appeal was appellant's right to a jury trial to determine the proper amount of the charging lien to be imposed. In deciding the appeal, this court necessarily construed article 1, section 22 of the Florida Constitution, which provides that: "[t]he right of trial by jury shall be secure to all and remain inviolate." Thus, had this Court issued a written opinion, rather than affirming the judgment below without opinion, appellants would have had the opportunity to seek review of the opinion by the Florida Supreme Court, pursuant to article 5, section 3(b)(3).

The construction placed on article 1, section 22 by this court and by the Third District Court of Appeal in *de la Cruz v. Brown,* 338 So.2d 245 (Fla. 3d DCA 1976), conflicts with a long line of cases assessing the right to a jury trial. It is not the nature of the cause that determines ones right to a jury trial; rather it is the issue to be addressed that must be considered in determining whether a jury trial should be granted.

Although the right to and enforcement of a charging lien are issues to be determined on an equitable basis, the amount of the fees to be assessed is a legal issue to which the right to trial by jury is inviolate. *See Stabinski Funt & De Oliveira, P.A. v. Alvarez,* 490 So.2d 159, 161 (Fla. 3d DCA 1986) *rev. denied,* 500 So.2d 545 (Fla. 1986)

(first party disputes between attorney and client are ordinary damage actions at law which are subject to trial by jury). Courts have repeatedly held that "[W]here both legal and equitable issues are presented in a single case 'only under the most imperative circumstances . . . can the right to jury trial of legal issues be lost . . .' " *Cerrito v. Kovitch*, 457 So.2d 1021, 1022 (Fla. 1984), (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959)). "[E]ven though some of the issues" to be adjudicated are equitable if other issues "are legal ones," the parties "are entitled to a jury trial on these." *Hobbs v. Florida First Nat. Bank*, 480 So.2d 153, 156 (Fla. 1st DCA 1985). Thus, the opinion in this case and *de la Cruz* are plainly in conflict in their construction of article 1, section 22, with Cerrito, Hobbs and the cases they cite.[1] Therefore, had a written opinion been issued, the discretionary jurisdiction of the Florida Supreme Court could have been sought on the basis of both constitutional construction and conflict.

9. Although one fact to consider in granting a stay is the likelihood that jurisdiction will be accepted by the Supreme Court, this case presents a unique situation in that it is the anticipated denial of jurisdiction by the Florida Supreme Court that will give rise to the anticipated grant of jurisdiction by the United States Supreme Court to consider this action.

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[1] Appellants' initial demand for a jury trial on all legal issues was sufficient to preserve that right notwithstanding their apparent acquiescence to non-jury proceedings. *Chenery v. Crans*, 497 So.2d 267, 269 (Fla. 2d DCA 1986). Further, appellants timely objected to the matter being heard without a jury.

10. Appellants seek a stay of the mandate to prevent execution by Appellees, pending review, on the funds currently held as a supersedeas of the final judgment in the registry of the circuit court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. A stay of the mandate would effectively extend the stay of proceedings issued by the Circuit Court on July 3, 1986, pending the appeal to the Second District Court of Appeal.

11. Appellants propose to leave those funds with the registry of the court pending all subsequent review.

12. For these reasons, Appellants request that this Court stay the issuance of the mandate. Appellants request that the mandate be stayed until either the cause has been fully determined, or counsel has had the opportunity to obtain a stay from the Florida Supreme Court.

WHEREFORE, Appellants seek the entry of an order staying the issuance of the mandate in this matter.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of July, 1988 to each party on the attached service list.

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## APPENDIX F

No. .....

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, SKYWAY DEVELOPMENT CORPORATION, a Florida corporation, and MURRAY WEISS,

Petitioners,

v.

SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.; LELARD E. STANSELL, JR.; JOHN H. LEWIS; and MARK A. KAMILAR,

Respondents.

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APPLICATION TO RECALL AND STAY MANDATE OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, PENDING CERTIORARI

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## APPLICATION TO RECALL AND STAY MANDATE OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, PENDING CERTIORARI

To the Honorable Anthony Kennedy, Justice of the United States and Circuit Justice for the Eleventh Circuit:

Petitioners, Consolidated Capital Corporation, Skyway Development Corporation and Murray Weiss, respectfully move for an order staying the issuance of the mandate of the Florida District Court of Appeal, Second District, in the above-entitled proceeding, pending the filing of and final action by this Court on a petition for certiorari seeking review of the Florida Supreme Court's refusal to review the Florida Second District Court of Appeal's opinion in this case.

Despite Petitioners' repeated, timely requests of both the Florida Second District Court of Appeal and the Florida Supreme Court to stay issuance of the mandate in this case pending further appellate review, both courts have refused to stay the mandate. Consequently, the mandate has been issued, and emergency relief is thereby required. Therefore, Petitioners request that an order be entered directing the Florida Second District Court of Appeal to recall its mandate and to stay issuance thereof pending certiorari proceedings.

The petition for certiorari will seek plenary review of the Florida Supreme Court's dismissal of Petitioners' attempt to obtain discretionary review of a decision of the Florida Second District Court of Appeal. The appellate court's opinion affirmed a Florida circuit court's

refusal of Petitioners' demand for a trial by jury and affirmed a judgment entered by the trial court awarding Respondents attorneys' fees and costs in the sum of $719,-935.05.

Petitioners have exhausted all possibilities of securing a stay of mandate from the Florida Second District Court of Appeal and the Florida Supreme Court. Respondents have indicated their intent to foreclose their charging lien on monies previously deposited by Petitioners in the registry of the Florida circuit court to secure the judgment pending appellate review.

(a) *Procedural history of the case*

The relevant procedural events in this case may be summarized as follows:

1. July 1, 1986: Entry of Florida Circuit Court's final judgment, after a summary, non-jury evidentiary proceeding, awarding attorneys' fees and costs and imposing charging liens over funds previously deposited in the registry of the circuit court by Petitioners. A copy of the Final Judgment is attached as Exhibit "A".

2. April 29, 1988: Florida Second District Court of Appeal, without comment, explanation or opinion, entered a per curiam order affirming the circuit court's final judgment. A copy of the order is attached as Exhibit "B".

3. May 16, 1988: Petitioners filed a timely motion for rehearing and rehearing en banc of the per curiam affirmance of the Florida Second District Court of Appeal.

4. June 17, 1988: The Florida Second District Court of Appeal, without comment, explanation, or hearing, de-

nied the motion for rehearing and for rehearing en banc. A copy of that order is attached as Exhibit "C".

5. July 1, 1988: Petitioners promptly filed a motion to stay issuance of mandate in the Second District Court of Appeal, pending certiorari proceedings in the Florida Supreme Court.

6. July 8, 1988: The Florida Second District Court of Appeal denied petitioner's motion to stay issuance of mandate. A copy of that order is attached as Exhibit "D".

7. July 8, 1988: Petitioners promptly filed a motion to review denial of their motion to stay issuance of the mandate and a motion to stay issuance of mandate in the Florida Supreme Court.

8. July 12, 1988: The Florida Supreme Court dismissed Petitioner's motion to review denial of motion to stay issuance of mandate and motion to stay issuance of mandate.

9. July 13, 1988: Petitioners filed the instant application with the clerk of this Court.

10. October 10, 1988: Present due date for filing petition for writ of certiorari; however, Petitioners are prepared to file their petition for certiorari on such other sooner date as the Honorable Justice may determine.

(b) *Standards for granting a stay*

The authority of this Court or any circuit justice to grant an application for stay of mandate is found in 28 U.S.C. § 2101(f), which reads:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . .

Stemming from that statutory provision, this Court's rule 44.1 states that "[a] stay may be granted by a Justice of this Court as permitted by law." To implement their jurisdiction to impose a stay, the circuit justices of the Court have established four general criteria that the stay applicant must satisfy to rebut the presumption that the decisions below—both on the merits and on the refusal to grant a stay pending certiorari—are correct. *See, e.g., Rostker v. Goldberg,* 448 U.S. 1306, 1308 (1980) (Brennan J., in Chambers). In sum, the applicant must make the following four-part showing:

1. The applicant must establish that there is a "reasonable probability" that four justices will consider the certiorari issues sufficiently meritorious to grant certiorari.

2. The applicant must show that there is a "fair prospect" that a majority of the Court will conclude that the decision below on the merits was erroneous.

3. The applicant must demonstrate that irreparable harm will result from the denial of a stay.

4. In close cases, it may be appropriate to balance the equities, by exploring the relative harms to the parties and to the public at large.

(c) *Application of the stay standards to this case*

(1) *The "reasonable probability" of granting certiorari*

This is not an ordinary case. Petitioners request that this Court rectify their inability to obtain review by the Florida Supreme Court of an appellate court's decision affirming, without written opinion, the trial court's denial of Petitioners' right to a jury trial. Petitioners question, on constitutional grounds, the extreme limitation placed on the discretionary jurisdiction of the Florida Supreme Court to review decisions of inferior Florida appellate courts.

Article V, section 3(b)(3) of the Florida Constitution limits the Florida Supreme Court's jurisdiction to review lower courts' decisions, based on conflict among appellate circuits or construction of the Florida or United States Constitutions, to cases in which a written opinion is issued. *See* art. V, § 3(b)(3), Fla. Const.; *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980). Article V, section 3(b)(3) states, in pertinent part, that the Florida Supreme Court "[m]ay review any decision of a district court of appeal that expressly . . . contrues a provision of the state or federal constitution, . . . or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In *Jenkins*, the Florida Supreme Court held that inclusion of the word "expressly" in article V, section 3(b)(3) deprives the Court of "jurisdiction to review *per curiam* decisions of the several district courts of appeal of this state rendered without opinion . . . when the basis for such review is an alleged conflict of that decision with a

decision of another district court of appeal or the Supreme Court." 385 So.2d at 1359. Based upon *Jenkins*, the Florida Supreme Court dismissed Petitioners' attempt to invoke its discretionary jurisdiction. Petitioners maintain that such application of article V, section 3(b)(3), as mandated by the interpretation given in *Jenkins*, constitutes a violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

The Florida Supreme Court's internal operating procedure rule II.A.1.(a) provides that a case will automatically be dismissed if no written opinion has been issued by the Florida district court of appeal. For this reason, Petitioners' Motion to Review Denial of Motion to Stay Issuance of Mandate and Motion to Stay Issuance of Mandate was automatically dismissed by the Clerk of the Florida Supreme Court.

The Florida Supreme Court is the only state supreme court in the United States whose discretionary jurisdiction is limited to cases in which the court whose decision is subject to review has chosen to write an opinion. Scheb & Scheb, "Making intermediate appellate court final: assessing jurisdictional changes in Florida's appellate courts," 67 *Judicature* 474 (1984) ("Florida's intermediate appellate courts now exercise a finality of jurisdiction unique among state appellate structures"). Almost one-half of all district court of appeal decisions are rendered in the form of a per curiam affirmance without opinion, and thus fall outside the jurisdiction of the Florida Supreme Court. *Scheb & Scheb, supra*, p. 481 (footnote omitted). Thus, almost one-half of all inter-

mediate appellate court decisions in Florida are immunized from further appellate review solely by virtue of the intermediate court's own decision not to write an opinion explaining the reasons for its decision.

Article V, section 3(b)(3) of the Florida Constitution thus defines two classes of litigants: Litigants who obtain not only a decision, but an opinion, from a district court of appeal may seek review of the district court of appeal decision by the Florida Supreme Court; litigants who obtain a decision, but no opinion, from a district court of appeal have no right to petition the Florida Supreme Court for review. This arbitrary classification of litigants violates the equal protection and due process clauses of the fourteenth amendment to the United States Constitution.

This Court has repeatedly held that, "if a State has created appellate courts . . . , the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey,* 469 U.S. 387, 393 (1985). This Court has assessed state appellate procedures in light of due process and equal protection requirements in both criminal and civil cases, *see, e.g., Douglas v. California,* 372 U.S. 353 (1963) (right to counsel on appeal from criminal conviction); *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645, 1651-54 (1988) (propriety of bond requirement for civil appeals); *Lindsley v. Normet,* 405 U.S. 56 (1972) (same), and in cases in which state law defined appellate jurisdiction as discretionary rather than mandatory; *see, e.g., Ross v. Moffitt,* 417 U.S. 600, 609-16 (1974).

As interpreted by *Jenkins*, article V, section 3(b)(3) of the Florida Constitution denies the Florida Supreme Court jurisdiction even to consider a litigant's petition for discretionary review if a district court of appeal has chosen to announce its decision through the vehicle of a per curiam affirmance rather than by an opinion explaining its conclusion. Which option the district court chooses is not within a litigant's control; however, which option the district court chooses determines whether a litigant will be given an opportunity in the Florida Supreme Court to argue that the district court decision requires review. A litigant's property rights are thereby taken: either the right represented by the underlying cause of action, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-33 (1982), or the entitlement created by article V, section 3 itself—the right to seek to invoke the Florida Supreme Court's discretionary review of a district court's decision that "construes a provision of the state or federal constitution" or "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Article V, section 3—or rather, the "expressly" limitation included in that provision—deprives petitioners of "the opportunity to present [their] case and have its merits fairly judged" with respect to the question of the propriety of Florida Supreme Court review. *Logan*, 455 U.S. at 433. Thus, the failure of the Florida Supreme Court, in this case, to allow Petitioners to attempt to invoke the discretionary jurisdiction of the court deprives Petitioners of a property right, without due process of law.

Even more clearly, the two classes that article V, section 3(b)(3) establish are arbitrarily defined, and, there-

fore, violate the Equal Protection Clause of the fourteenth amendment. Cases have arisen, and will continue to arise, in which the Florida Supreme Court's jurisdiction would obviously have been proper but for the decision of a district court of appeal to announce its judgment in the form of a per curiam affirmance, without opinion. As this Court recognized in *Logan*, "[a] system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." 455 U.S. at 434-35. The Court already has seen evidence that the arbitrary classification of litigants imposed by article V, section 3(b)(3) will lead to the termination of meritorious claims, as in this case. In *Palmore v. Sidoti*, 426 So.2d 34 (Fla. 2d DCA 1982), the Second District Court of Appeal affirmed per curiam a trial court's decision denying a woman custody of her child because the woman, who was white, was living with a black man. Denied the jurisdiction of the Florida Supreme Court, the woman successfully sought review in the United States Supreme Court, obtaining a unanimous decision reversing the Second District Court of Appeal decision. *See Palmore v. Sidoti*, 466 U.S. 429 (1984). Thus, this Court's reversal in *Palmore* of the otherwise unreviewable decision of the Florida Second District Court of Appeal illustrates the likelihood that article V, section 3 will foreclose review of meritorious claims by the Florida judicial system.

Article V, section 3, "converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification." It is, therefore, "the very essence of arbitrary state action." *Logan*,

455 U.S. at 442 (opinion of Blackmun, J.). Under article V, section 3, litigants "with identical claims, despite equal diligence in presenting them," may "be treated differently," depending on whether a district court of appeal chooses to write an opinion. Litigants possess no power to require a district court of appeal to issue an opinion, and thus "it is unfair and irrational to punish them" for a district court's failure to do so. *Logan*, 455 U.S. at 443, 444 (Powell, J., concurring in judgment). Article V, section 3, therefore, constitutes an "effective foreclosure of a state right to appeal as to some litigants only," *Crenshaw*, 108 S.Ct. at 1654, n.6, and, thus, as this Court has twice suggested in recent years, would "violate equal protection guarantees under even deferential scrutiny," *id.*; *Lindsley*, 405 U.S. at 77, 79. On these grounds, Petitioners sought to invoke the Florida Supreme Court's jurisdiction and seek to challenge in this Court their inability to obtain Florida Supreme Court review of this action.

The Florida Supreme Court's arbitrary denial of review of this case effectively deprived Petitioners of their constitutional right to a jury trial. The foremost issue before the court on appeal was Petitioners' right to a jury trial to determine the proper amount of charging liens to be imposed. In deciding the appeal, the Second District Court necessarily construed article I, section 22 of the Florida Constitution, which provides that: "[t]he right of trial by jury shall be secure to all and remain inviolate." Thus, had the district court issued a written opinion, rather than affirming the judgment below without opinion, Petitioners would have had the opportunity to seek review of the opinion by the Florida Supreme Court, pursuant to article V, section 3(b)(3).

The construction placed on article I, section 22 implicitly by the Florida Second District Court of Appeal and explicitly by the Florida Third District Court of Appeal in *de la Cruz v. Brown*, 338 So.2d 245 (Fla. 3d DCA 1976), (charging lien is equitable in nature and court can determine amount of fee), conflicts with a long line of cases assessing the right to a jury trial (*see, e.g., Cerrito v. Kovitch*, 457 So.2d 1021 (Fla. 1984); *Hobbs v. Florida National Bank*, 480 So.2d 153 (Fla. 1st DCA 1985)). It is not the nature of the cause that determines the right to a jury trial; rather it is the issue to be addressed that must be considered in determining whether a jury trial should be granted.

Although the right to and enforcement of an attorneys charging lien are issues to be determined on an equitable basis, the amount of the fees to be assessed is a legal issue to which the right to trial by jury is inviolate. *See Stabinski Funt & De Oliveira, P.A. v. Alvarez*, 490 So.2d 159, 161 (Fla. 3d DCA) ("first party disputes between attorney and client . . . are ordinary damage actions at law which are subject to trial by jury"), *review denied*, 500 So.2d 545 (Fla. 1986). Courts have repeatedly held that "where both legal and equitable issues are presented in a single case 'only under the most imperative circumstances . . . can the right to jury trial of legal issues be lost . . .'" *Cerrito*, 457 So.2d at 1022, (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959)). "[E]ven though some of the issues" to be adjudicated are equitable, if other issues "are legal ones," the parties "are entitled to a jury trial on these." *Hobbs*, 480 So.2d at 156. Thus, the opinion of the Florida Second District Court of Appeal in this case and the opinion in *de la Cruz* are

plainly in conflict in their construction of article I, section 22, with *Cerrito, Hobbs* and the cases they cite. Therefore, had a written opinion been issued, the discretionary jurisdiction of the Florida Supreme Court could have been sought on the basis of both constitutional construction and conflict.

Additionally, the final judgment by the trial court ruled on issues never raised before the summary charging lien proceedings and upon which evidence was precluded. The final judgment contains gratuitous language referring to the preparedness of counsel Shea & Gould and Conroy, Simberg & Wilensky and the caliber of representation received by Petitioners, even though the trial judge sustained objections to the introduction of evidence relating to counsel's preparedness, and noted that the issue was not being tried. In ruling on the issue of whether the trial court erred in making these findings, the Second District Court necessarily construed the fifth and fourteenth amendments to the United States Constitution and concluded that the judge's ruling on an issue not raised and on which the parties had not been given notice or an opportunity to be heard did not violate due process. This conclusion is not only erroneous, but is a clear departure from the essential requirements of law. *Department of Environmental Regulation v. Montco Research Products Inc.*, 489 So.2d 771, 773 (Fla. 5th DCA), *review denied*, 494 So.2d 1152 (1986). Thus, had the district court issued a written opinion addressing this point, review could have also been sought in the Florida Supreme Court on the basis of construction of a provision of the federal constitution.

(2) *The "fair prospect" that the decision below will be found erroneous*

What has been said above with respect to the reasonable likelihood that certiorari will be granted suffices to demonstrate the fair prospect that the majority of this Court might well conclude that article V, section 3(b)(3) of the Florida Constitution, as interpreted by the Florida Supreme Court since its opinion in *Jenkins*, 385 So.2d 1356, violates the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution. The Florida Supreme Court's dismissal of Petitioner's motion to stay the mandate and its inability to grant discretionary review of the circuit court's denial of Petitioners' right to a jury trial is a clear deprivation of Petitioners' constitutional rights to equal protection, due process and a jury trial of all issues at law.

(3) *The irreparable harm to Petitioners if the stay is denied*

The stay as requested is necessary to preserve monies currently held in the registry of the Florida circuit court as a cash supersedeas of the final judgment. If Respondents are permitted to execute upon these monies, it is likely that they would thereafter be dissipated. Dissipation of the funds is particularly likely in light of the fact that the law firm of Shea & Gould has recently announced that it may soon cease doing business in the State of Florida, and therefore may no longer be amenable to service in the State of Florida should a suit for the demand of repayment be necessary. If the monies are dissipated by Respondents, eventual recovery by Petitioners

may prove next to impossible, or at the least, extremely difficult and expensive.

In any event, Respondents are fully protected if the requested stay is granted. Petitioners have posted $1 million in the circuit court, which has in turn invested the funds in an interest-bearing account. Thus, the $1 million plus accrued interest is sufficient to secure the judgment and any additional interest that may accrue. On the other hand, Petitioners have no assurance or guarantee that, if the judgment is now executed, the funds paid to Respondents will remain intact or can otherwise be recouped from Respondents. If Petitioners prevail on appeal, it will be necessary for them to file numerous lawsuits against the individual Respondents in order to achieve repayment of the funds. The spectre of having no assured way of securing repayment in the event Petitioners ultimately prevail might well discourage and chill Petitioners' right to seek Supreme Court review.

In sum, if the mandate is not recalled and stayed, it is likely that Petitioners will suffer irreparable financial injury. At the least, the injury to Petitioners if no stay is granted will outweigh any possible injury to Respondents if the stay is granted.

(4) *The balance of equities*

For the above-stated reasons, the balance of equities weigh on Petitioners' side. Respondents are fully protected against prejudice by the presence of sufficient funds in the registry of the circuit court, while Petitioners might suffer irreparable injury. As the Court is currently in summer recess, it serves both the individual and public interests to recall and stay the mandate until such time

as Petitioners can file their petition for certiorari and this Court can consider that petition.

(d) *Conclusion*

For these reasons, Petitioners request that an order be entered requiring the Second District Court of Appeal to recall the mandate and to stay it, pending completion of certiorari proceedings before this Court.

Respectfully submitted,

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By: /s/ Lawrence A. Kellogg, for
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JR.,
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 13, 1988, the foregoing was served by mail, postage pre-paid, on the following persons:

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/s/ Lawrence A. Kellogg,
Of Counsel

## APPENDIX G

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

JUNE 17, 1988

| | |
|---|---|
| CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, SKYWAY DEVELOPMENT CORPORATION, a Florida corporation and MURRAY WEISS, Appellants, v. SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.; LELAND E. STANSELL, JR.; JOHN H. LEWIS and MARK A. KAMILAR, Appellees. | Case No. 86-2100<br>86-2259<br>CONSOLIDATED |

Appellants, Consolidated Capital Corporation and Skyway Development Corporation having filed a motion for rehearing and for rehearing en banc in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied. It is further

ORDERED Appellant, Murry Weiss motion for rehearing and rehearing en banc and for certification of questions are hereby denied.

A TRUE COPY
ATTEST:

/s/ WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: LAWRENCE A. KELLOGG, ESQUIRE
ROBIN S. TRUPP, ESQUIRE
MARK A. KAMILAR, ESQUIRE
JOHN H. LEWIS, ESQUIRE
H. JACK KLINGENSMITH, ESQUIRE
PAMELA BECKHAM, ESQUIRE
RICHARD M. ZABAK, ESQUIRE
EVAN J. LANGBEIN, ESQUIRE

**APPENDIX H**

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NOS: 86-2100
86-2259
CONSOLIDATED

FLORIDA BAR NO: 328601

CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, SKYWAY DEVELOPMENT CORPORATION, a Florida corporation, and MURRAY WEISS,

Appellants,

v.

SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.; LELAND E. STANSELL, JR.; JOHN H. LEWIS; and MARK A. KAMILAR,

Appellees.

/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is given that CONSOLIDATED CAPITAL CORPORATION, SKYWAY DEVELOPMENT CORPORATION and MURRAY WEISS, Appellants, Petitioners, invoke the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered June 17, 1988. The decision "expressly" construes a pro-

vision of the State Constitution, "expressly" construes provisions of the Federal Constitution, and "expressly and directly" conflicts with the decisions of another district court of appeal and of the Supreme Court on the same question of law.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 5th day of July, 1988 to each party on the attached service list.

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## APPENDIX I

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

JULY 8, 1988

| | | |
|---|---|---|
| CONSOLIDATED CAPITAL CORPORATION, a Florida corporation, SKYWAY DEVELOPMENT CORPORATION, a Florida corporation and MURRAY WEISS, | ) | |
| Appellants, | ) | Case No. 86-2100<br>86-2259 |
| v. | ) | |
| SHEA & GOULD; CONROY, SIMBERG & WILENSKY; CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.,; LELAND E. STANSELL, JR.; JOHN H. LEWIS and MARK A. KAMILAR, | ) | |
| Appellees. | ) | |

Counsel for appellants having filed a motion to stay the mandate in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY

ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Lawrence A. Kellogg, Esq.
Robin S. Trupp, Esq.
H. Jack Klingensmith, Esq.
Pamela Beckham, Esq.
Honorable Richard L. Ake
Evan J. Langbein, Esq.
John H. Lewis, Esq.
Mark A. Kamilar, Esq.

## APPENDIX J

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
Clerk Of The Court

Area Code 202
479-3011

July 20, 1988

Mr. Lawrence A. Kellogg
Tew Jorden Schulte & Beasley
701 Brickell Avenue
Miami, FL 33131

Re: Consolidated Capital Corporation, et al.,
v. Shea & Gould, et al.,
Application No. A88-36

Dear Mr. Kellogg:

The application to recall and stay mandate pending the timely filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on July 20, 1988, endorsed thereon the following:

"7/20/88

Denied
WHR"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

/s/ By Edward L. Turner, Jr. kb
Edward L. Turner, Jr.
Assistant Clerk

NOTE—FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
Clerk Of The Court

Area Code 202
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SUPREME COURT OF THE UNITED STATES
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Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-632

In The

# Supreme Court of the United States

October Term, 1988

CONSOLIDATED CAPITAL CORPORATION,
a Florida corporation,
SKYWAY DEVELOPMENT CORPORATION,
a Florida corporation,
and MURRAY WEISS,

*Petitioners,*

v.

SHEA & GOULD; CONROY, SIMBERG & WILENSKY;
CAREY, DWYER, COLE, ECKHART, MASON & SPRING,
P.A.; LELAND E. STANSELL, JR.;
JOHN H. LEWIS; and MARK A. KAMILAR,

*Respondents.*

## BRIEF FOR RESPONDENT SHEA & GOULD

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## PRELIMINARY STATEMENT

The appendices to the petition for writ of certiorari shall be cited by use of one letter, e.g., "A".

The appendices to this brief shall be cited by use of two letters, e.g., "AA".

## STATEMENT OF THE CASE

On July 1, 1986, the Florida circuit court entered a final judgment "for enforcement of attorneys' charging liens." Appendix C, p. 6a. The judgment awarded respondents attorney's fees for their legal representation of petitioners. Appendix C, p. 5a-18a. It did not, however, draw in question the validity of article V, section 3(b)(3) of the Florida Constitution under the Fourteenth Amendment to the United States Constitution. Appendix C, p. 5a-18a. In fact, the judgment had absolutely nothing to do with article V, section 3(b)(3). Appendix C, p. 5a-18a.

Petitioners appealed that final judgment to the Second District Court of Appeal of Florida, which affirmed without opinion on April 29, 1988. Appendix B, p. 3a-4a. Petitioners then filed motions for rehearing and for rehearing en banc, which the Second District denied without opinion. Appendix G, p. 63a-64a.

Subsequently, on July 1, 1988, petitioners filed in the Second District a motion to stay issuance of mandate, arguing that because petitioners intended to challenge in the Florida Supreme Court and in this Court the validity of article V, section 3(b)(3), the mandate should not issue. Appendix E, p. 31a-39a. The Second District denied that

motion without opinion and issued the mandate. Appendices I, p. 69a; AA.

On July 5, 1988, petitioners filed in the Second District a notice to invoke the discretionary jurisdiction of the Florida Supreme Court. Appendix H, p. 65a-66a. On July 8, 1988, petitioners filed in the Florida Supreme Court a motion to stay issuance of mandate, arguing that article V, section 3(b)(3) violates the equal protection and due process clauses of the Fourteenth Amendment. Appendix D, p. 19a-29a. Because it was "without jurisdiction," however, the Florida Supreme Court dismissed the appeal. Appendix A, p. 1a. It never considered or ruled on the motion to stay issuance of mandate, noting that "[it] is moot as the case will be dismissed." Appendix BB, p. 2a.

There is, therefore, no state court final judgment that draws in question the validity of article V, section 3(b)(3). Indeed, a review of the judgments – the circuit court's final judgment, the Second District's affirmance without opinion, and the Florida Supreme Court's dismissal for lack of jurisdiction – reveals a case about attorney's fee charging liens – and nothing else. Not until petitioners filed their motion to stay issuance of mandate in the Second District was there even a mention of article V, section 3(b)(3). And, that motion did not request a ruling on article V, section 3(b)(3)'s validity, rather a stay of the mandate pending a challenge to that provision in the Florida Supreme Court and in this Court. Appendix E, p. 31a-39a. The constitutional challenge to article V, section 3(b)(3) was first made in petitioners' motion to stay issuance of mandate filed in the Florida Supreme Court. Appendix D, p. 19a-29a. That issue, however, was not

considered or ruled on by the Florida high court, as it had no jurisdiction over the appeal. Appendices A, p. 1a; BB, p. 2a.

## SUMMARY OF ARGUMENT

This Court does not have jurisdiction to consider the constitutional issue presented in the petition for writ of certiorari. Therefore, the petition should be denied.

## ARGUMENT

Because there is no state court final judgment that draws in question the validity of article V, section 3(b)(3) of the Florida Constitution under the Fourteenth Amendment to the United States Constitution, this Court has neither appellate nor certiorari jurisdiction. 28 U.S.C. §§1257(2), (3). *See, e.g., Kennard v. Nebraska*, 22 S.Ct. 879, 881 (1902) (Validity of statute "was not drawn in question" where petitioner had "specially set up or claimed no Federal right, and as the judgment of the supreme court of Nebraska did not impugn the validity of any statute . . . , we find nothing on which to rest a right to review that judgment").

In *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987), the California Supreme Court denied review of a California Court of Appeal decision, and the appellants sought review in this Court under section 1257(2). This Court held that it had appellate jurisdiction because the appellants had

"squarely challenged the constitutionality of the [California] Unruh Act, . . . and the [California] Court of Appeal [had] sustained the validity of the statute." *Id.* at 1945 n.3. Section 1257(2) confers jurisdiction " 'when a state court holds [a state statute] applicable to a particular set of acts as against the contention that such application is invalid on federal grounds.' " *Id., quoting Japan Line v. County of Los Angeles,* 99 S.Ct. 1813, 1817 (1979). This Court found, however, that it was without jurisdiction to consider the contention that the California Unruh Act was unconstitutionally vague and overbroad:

> We conclude that these contentions were not properly presented to the state courts. It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." . . . Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the [California] Court of Appeal. The court denied the petition without opinion.

*Rotary International,* 107 S.Ct. at 1948, *quoting Webb v. Webb,* 101 S.Ct. 1889, 1891-92 (1981). Likewise, here petitioners did not present their federal constitutional challenge until they filed in the Florida Supreme Court their motion to stay issuance of mandate. Appendix D, p. 19a-29a. That court did not consider or rule on petitioners' claim of unconstitutionality, however, as the motion was "moot" due to the court's lack of jurisdiction over the appeal. Appendices A, p. 1a; BB, p. 2a.

In *Perry v. Thomas,* 107 S.Ct. 2520 (1987), the California Supreme Court denied review of a California Court of

Appeal decision, and the appellants obtained review in this Court under section 1257(2). This Court, however, refused to address one of the claims because "[it] was not decided below." *Id.* at 2527 n.9. Likewise, here the validity of article V, section 3(b)(3) was not "decided" below. *Cf. Palmore v. Sidoti,* 104 S.Ct. 1879, 1881 (1984) (After Second District Court of Appeal of Florida affirmed without opinion, "thus denying the Florida Supreme Court jurisdiction to review the case," this Court granted certiorari to review the judgment of the Florida circuit court because it had "raise[d] important federal concerns arising from the [United States] Constitution's commitment to eradicating discrimination based on race"); *Ocala Star-Banner Co. v. Damron,* 91 S.Ct. 628, 631 n.3 (1971) (After Florida Supreme Court denied review of First District Court of Appeal of Florida decision for lack of jurisdiction, this Court "granted certiorari to consider the federal constitutional issues presented . . . since both the trial court . . . and the state appellate court [had] considered and passed upon the constitutional question as though properly raised").

Unlike *Sidoti* and *Damron,* here there is no state trial or appellate court final judgment that raises and passes upon a federal constitutional question. Petitioners had to first present their constitutional challenge in the trial court. *See Davis v. Department of Health & Rehabilitative Services,* 390 So.2d 1194 (Fla. 1980); *Division of Bond Finance v. Smathers,* 337 So.2d 805, 807 (Fla. 1976). Because petitioners did not do this, there is no state court final judgment that draws in question the validity of article V, section 3(b)(3) under the Fourteenth Amendment. Thus, this Court has neither appellate nor certiorari jurisdiction

under section 1257. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645, 1649-50 (1988).

## CONCLUSION

The petition for writ of certiorari should be denied.

October 28, 1988.

Respectfully submitted,

H. JACK KLINGENSMITH
Counsel of Record

ALBERTO A. MACIA
SHEA & GOULD
801 Brickell Avenue
Miami, Florida 33131
(305) 372-2000

## APPENDIX AA

## MANDATE

**From**
**DISTRICT COURT OF APPEAL OF FLORIDA**
**SECOND DISTRICT**

**STYLE:** Consolidated Capitol v. Shea & Gould, et al.
**COUNTY:** Hillsborough
**APPELLATE CASE NO:** 86-2100 & 86-2259
**TRIAL COURT CASE NO:** 82-12358 Div P, 85-12559 Div. J,

This cause having been brought to this Court by appeal and after due consideration, the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings be had in said cause in accordance with the opinion of this Court and with the rules of procedure and laws of the State of Florida.

**Witness,** The Honorable Monterey Campbell, Chief Judge of the District Court of Appeal of the State of Florida, Second District, and the seal of the said Court at Lakeland, Florida on this day.

July 8, 1988

/s/ William A. Haddad
William A. Haddad
Clerk, District Court of
Appeal of Florida,
Second District

## APPENDIX BB

SID J. WHITE, CLERK
**Supreme Court of Florida**
SUPREME COURT BUILDING
TALLAHASSEE 32399-1927 July 11, 1988

Lawrence A. Kellogg, Esq.
Bonnie L. Cooper, Esq.
701 Brickell Ave.
Miami, Florida 33131

RE: CONSOLIDATED CAPITAL CORP., ETC., ET AL.
VS.
SHEA AND GOULD, ET AL.

CASE NO. 72,703

I have this date received the below-listed pleadings or documents:

Petition for Review filed with 2nd DCA on 7-7-88 and copy of opinion. DCA CASE NO. 86-2100 and 86-2259

Filing fee – Receipt No. 82997

Motion to Review Denial of Motion to Stay Issuance of Mandate and Motion to Stay Issuance of Mandate is moot as the case will be dismissed.

Please make reference to the case number in all correspondence and pleadings.

SJW/pb

cc: Robin S. Trupp, Esq.
Richard M. Zabak, Esq.
Mark A. Kamilar, Esq.
John H. Lewis, Esq.
H. Jack Klingensmith, Esq.
Pamela Beckman, Esq.
Leland E. Stansell, Jr., Esq.
Evan J. Langbein, Esq.
Alberto A. Macia, Esq.
Hon. William A. Haddad
Clerk, DCA-2

Most cordially,
/s/ Sid J. White
Clerk, Supreme Court

Supreme Court, U.S.
FILED
DEC 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-632

In The

# Supreme Court of the United States

October Term, 1988

CONSOLIDATED CAPITAL CORPORATION,
a Florida corporation,
SKYWAY DEVELOPMENT CORPORATION,
a Florida corporation
and MURRAY WEISS,

*Petitioners,*

v.

SHEA & GOULD; CONROY, SIMBERG & WILENSKY;
CAREY, DWYER, COLE, ECKHART, MASON & SPRING,
P.A.; LELAND E. STANSELL, JR.;
JOHN H. LEWIS; and MARK A. KAMILAR,

*Respondents.*

## BRIEF FOR RESPONDENT, CONROY, SIMBERG & WILENSKY AND RESPONDENT, JOHN H. LEWIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRY T. WIHNYK, ESQUIRE
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9 pp

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## PREFACE

All references to the appendices to the Petition for Writ of Certiorari will appear as follows:

(A. ___)

## STATEMENT OF CASE

Respondent, CONROY, SIMBERG & WILENSKY, and Respondent, JOHN H. LEWIS, adopt and join in Respondent, SHEA & GOULD'S, Statement of the Case.

## ARGUMENT

### I.

### THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE CONSTITUTIONAL ISSUE PRESENTED BECAUSE THERE IS NO STATE COURT FINAL JUDGEMENT THAT DRAWS IN QUESTION THE VALIDITY OF THE PROVISION OF THE FLORIDA CONSTITUTION ATTACKED BY PETITIONERS

Respondent, CONROY, SIMBERG & WILENSKY, and Respondent, JOHN H. LEWIS, join in the argument raised by Respondent, SHEA & GOULD, to the effect that this Court does not have jurisdiction to consider the constitutional issue presented by Petitioners because there is no state court final judgement that draws in question the validity of Article V, Section 3(b)(3), of the Florida Constitution under the Fourteenth Amendment to the United States Constitution. Consequently, Respondents adopt

that argument herein and urge that the Petition be denied.

The obvious and paramount reason that there is no state court final judgement that raises, considers or passes on the constitutional question raised in the Petition is that the validity of Article V, Section 3(b)(3), of the Florida Constitution was not raised as an issue in the appeal to the District Court of Appeal of Florida, Second District. Petitioners never discussed the issue until they mentioned it in the various Motions to Stay Issuance of Mandate. (A. 19a, 31a). However, this is not a sufficient raising of the federal question to invoke this Court's jurisdiction here.

In order to invoke the jurisdiction of the Supreme Court of the United States under 28 U.S.C. Section 1257, the Petitioner must have afforded the state court a fair opportunity to address the federal question that is sought to be presented to this Court.

> At the minimum . . . there should be no doubt from the record that a [federal] claim . . . was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and *in the manner required by the state law.* (emphasis added).

*Webb v. Webb,* 101 S.Ct. 1889,1894 (1981); *Bankers Life and Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988).

Although Petitioners maintain that they raised the federal question properly, a review of the record demonstrates the contrary. Mentioning the constitutional issues relating to Article V, Section 3, (issues totally unrelated to the issues argued to the appellate court on the merits) in various motions seeking a stay of the mandate is not the

manner for mounting a constitutional challenge of a provision of the Florida Constitution in the courts of Florida.

A motion pursuant to Rule 9.310 of the Florida Rules of Appellate Procedure merely seeks a stay pending review in another court. A mandate is the official mode of the appellate court of communicating its judgement to the lower court, directing the action to be taken or the disposition to be made of the cause. *Tierney v. Tierney*, 290 So.2d 136 (Fla. 2d DCA 1974). In this case the Petitioners were employing Rule 9.310 merely to stay issuance of the document that would have made final the appellate court's decision to affirm the judgment of the trial court enforcing attorneys' charging liens. (A. 3a). Certainly such a motion in the appellate or Supreme Court of Florida does not afford those courts a fair or proper opportunity to consider federal constitutional challenges directed to issues completely unrelated to the issues passed on by the trial and appellate courts. Hence, it defies logic for Petitioners to maintain that the courts could have considered and resolved their federal constitutional challenge to Florida's appellate system in motions directed to the ministerial act of finalizing the judgment enforcing charging liens.

There is no state court judgement that draws in question the validity of Article V, Section 3, of the Florida Constitution. Moreover, the Florida courts were not given a fair opportunity to consider the federal questions improperly raised by Petitioners. Therefore, this Court has neither appellate nor certiorari jurisdiction under Section 1257.

## II.

## THE PETITIONERS FAIL TO DEMONSTRATE ANY VIOLATION OF THEIR CONSTITUTIONAL RIGHTS

Respondents maintain that this Court does not have jurisdiction over the Petition. However, even if there were jurisdiction, the Petition should be denied because Petitioners have failed to demonstrate that there is a violation of their constitutional rights. Petitioners' attacks against Article V, Section 3, of the Florida Constitution are without merit. Therefore, the Petition should be denied.

Petitioners argue that Article V, Section 3, of the Florida Constitution violates equal protection and due process because, under the circumstances in this case, Petitioners were forestalled from review in the Supreme Court of Florida. The rationale behind this argument is that once a state creates appellate courts, appeals must be decided according to a procedure that comports with due process and equal protection. Petitioners contend that their appeal was not decided according to a constitutionally valid process. This argument is based on the assumption that there must be an unrestricted right to access to review in the Florida Supreme Court. However, Petitioners fail to recognize that under the appellate court system of Florida the District Courts of Appeal were not created as intermediate courts "but as the 'end of the road' for most appeals." *Williams v. Wainwright*, 452 F.2d 775 (5th Cir. 1971). Just as with this Court there is no unrestricted right to appeal or access by way of petition to the Florida Supreme Court.

The fundamental fallacy with Petitioners' position is that it places the failure to obtain review in the Florida Supreme Court on a par with the denial of the right to an appeal. This is underscored by the fact that Petitioners rely on authorities such as *Douglas v. California*, 372 U.S. 353 (1963), to support their position. However, these authorities involve situations where litigants are barred for one reason or another from their one appeal as of right.

In *Douglas*, this Court held that the Fourteenth Amendment is violated where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel in a criminal case. However, in *Ross v. Moffitt*, 417 U.S. 600 (1974), this Court refused to extend that holding to situations involving discretionary state appeals or applications for review in this Court, the rationale partially being that the litigant's claims had once been presented by legal counsel and passed on by an appellate court. *Ross*, at 614. Clearly, constitutional safeguards that apply to an appeal as of right do not extend to later discretionary review. Moreover, no case is cited to support any constitutional requirement for discretionary review.

The record is clear that Petitioners received their appeal as of right in the Second District Court of Appeals and, thus, were provided the opportunity to fully litigate their cause up to the appellate court provided by Florida law as the final arbiter as of right in this case. Petitioners have failed to provide any support, however, that their right to appeal was denied because they were forestalled from obtaining discretionary review in the Florida Supreme Court. Consequently, Petitioners have failed to

demonstrate that their constitutional rights have been violated.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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